sumed, until the contrary is proved, to be trafficking in the said drug. In fact, the act of carrying itself falls under the definition of 'trafficking' in s 2.

I have no reason to doubt the truth of the testimonies of the members of the police party, viz PW2, PW3 and PW6, though there are apparent differences in their evidence in respect of (i) in which hand the accused was carrying the plastic bag at the relevant time and (ii) whether the accused and PW5 were seen near the Ann Kwai Club building earlier at 7 pm that night. I regard these differences as minor differences attributable mainly to differences in recollection which do not affect their credibility. With regard to PW5, he is not an accomplice since he had made himself an agent for the prosecution before the actual commission of the offence: *Sathasivam & Ors* v *PP*.[1] There is no doubt that he is an agent provocateur. Generally, the court is always wary in accepting the evidence of an agent provocateur but in this case the legislature under s 40A of the Dangerous Drugs Act 1952 had provided that the evidence of any agent provocateur shall be admissible and treated as any other evidence from any ordinary witness. By virtue of this section, the evidence of an agent provocateur needs no corroboration to found a finding by the trial court; however, PW5 was amply corroborated by the evidence of PW2, PW3 and PW6. Hence, I found that a prima facie case had been established against the accused and called for his defence.

The accused deposed that he knew PW5 and used to meet him on several occasions in Labuan town before the night of the incident. That night he went for a walk in town with PW5. He denied carrying the plastic bag at the time of the arrest but alleged that PW5 was carrying a black plastic bag and when PW5 ran away, PW5 threw the bag to him. After the arrest, upon being assaulted by the police, he led the police party to Jalan Ranca-Ranca and to a spot near Southern Hotel where the plastic bag was alleged to have been taken but nothing was found there. In short, his defence was that he had no knowledge of the drug at all.

Having deliberated on his entire defence, I did not consider the accused person's story to be reasonably true or consistent with his innocence. The conclusion is based on these arguments. Firstly, his contention that he was not carrying the plastic bag was a mere denial having regard to the evidence of PW2, PW3, PW5 and PW6 on this point to the contrary, that is to say, he was caught red-handed to have in his custody or under his control the bag which contained the drug. Secondly, the alleged assault by the police was a bare assertion. If he really had no knowledge of the plastic bag and its contents there was no reason for him to tell the police party that the bag was taken from Jalan Ranca-Ranca and from the spot near Southern Hotel and to lead the police party to those places. By necessary implication, he must have picked up the cannabis from both or any of the said places otherwise he would not have told the police party so. This fact confirms PW5's evidence who said that he waited for the accused to fetch the cannabis. Lastly, the bag was an ordinary plastic bag which one could easily know its contents by merely opening it.

Hence, the accused had not rebutted the aforesaid statutory presumptions on the balance of probabilities. Therefore, the prosecution had proved its case beyond reasonable doubt and I found the accused guilty of the offence for which he was charged and convicted him. And I sentenced him to death.

The accused appeals.

Order accordingly.

Solicitors: *PK Lim & Co.*

Reported by *Ng Sheau Jiuan*

Ka Yin Credit & Leasing Sdn Bhd v Pang Kim Cha & Bros Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C23-1277-86
SHANKAR J
28 MARCH 1988

Hire Purchase – Hire purchase of bulldozer – Bulldozer destroyed by fire during currency of hire-purchase agreement – Whether agreement frustrated and hirer relieved of obligation to pay further instalments – Specific clause in agreement stipulating liability to pay rental despite damage or destruction

The first defendant took on hire purchase from the plaintiffs one bulldozer. The transaction was the subject of a formal hire-purchase agreement ('the agreement') and the first defendant took out an all-risks policy on the bulldozer in which the plaintiffs were named as owner and the first defendant's name as hirer. The policy specifically provided a provision stating that any moneys payable to the first defendant under the policy shall be paid to the plaintiffs. During the currency of the agreement, the bulldozer was destroyed by fire. The first defendant declined to pay any further instalments under the agreement until their claim against the insurers was first resolved. The plaintiffs insisted on the instalments under the agreement being paid and when this did not happen they terminated the agreement and sued for the full balance due. The senior assistant registrar refused to give the plaintiffs summary judgment and the plaintiffs appealed to the High Court.

Held, allowing the plaintiffs' appeal:

Clause 4(i) of the agreement is a complete answer to the defendant's submission. The clause states, inter alia, that 'destruction of or damage to the goods shall not discharge the hirer's liability to pay all sums due under this agreement'. Under that clause, liability to pay the full rental thus continues despite damage or destruction. Consequently, there is no defence to this claim whatsoever.

[*Editorial Note*: The defendant appealed to the Supreme Court vide Civil Appeal No 389 of 1987. The Supreme Court (comprising Wan Suleiman, Seah and Abdoolcader SCJJ) dismissed the appeal on 4 April 1988.]

Case referred to

1 *Tiong Goon Toon* v *Credit Leasing Corpn Sdn Bhd* [1986] 1 CLJ 604

Leong Jian Chong for the plaintiffs.
TS Marbeck for the defendant.

Cur Adv Vult

Shankar J: On 9 February 1984 the first defendant ('the company') took on hire purchase from the plaintiffs ('Ka Yin') one bulldozer. The transaction was the subject of a formal hire-purchase agreement ('the agreement'). During the currency of the agreement the bulldozer was destroyed by fire. The defendants declined to pay any further instalments under the agreement until their claim against their insurers was first resolved. Ka Yin insisted on the instalments under the agreement being paid. When this did not happen they terminated the agreement and sued for the full balance due. The senior assistant registrar refused to give the plaintiffs summary judgment. The plaintiffs appealed to me. I reversed the registrar's dismissal and gave the plaintiffs judgment for the amount claimed. The company now appeals to the Supreme Court.

We are only concerned here with Ka Yin and the company. By the agreement the company contracted to pay 30 rent instalments of $4,550 each commencing one month from 9 February 1984. By cl 4(e) of the agreement the company agreed to insure the bulldozer with an insurance company approved by Ka Yin under a fully comprehensive policy in Ka Yin's name as owner and the company's name as hirer for an amount equal to the full replacement value of the goods against fire and other risks. The policy was specifically required to contain a provision stating that any moneys payable to the company under the policy shall be paid to Ka Yin. Under cl 4(f) of the agreement the insurance policy was required to be delivered to Ka Yin for retention.

The company accordingly took out an all-risks policy with Hong Leong Assurance Sdn Bhd ('the insurers'). The company is named as the insured in the policy but there was a hire-purchase endorsement attached to the policy which presumably complied with the requirements of the agreement.

By January 1985 the company had paid only six instalments instead of ten. On 5 January 1985 there was a fire in which the bulldozer was completely destroyed. From that day onwards the company declined to pay any further instalments. On or about 24 January 1985 it received a copy of the insurance policy from Ka Yin who requested the company to keep them informed of the development of its insurance claims. The company says that Ka Yin instructed a firm of loss adjusters to look into the matter. On 13 February 1985 UMW (Malaya) Sdn Bhd quoted a sum of $93,845.46 to repair the bulldozer. On 19 August 1985 the insurers by letter offered the company $45,000 only as repair costs of the bulldozer in full and final settlement! The company wrote a strong letter to the insurers on 30 August 1985 protesting against this offer and reminding the insurers that the bulldozer was insured for $150,000. They requested for a more realistic offer or alternatively called upon the insurers to repair the vehicle themselves. The insurers responded by letter on 11 September 1985 stating that they were unable to review their stand.

Presumably this is what led the company to file a Civil Suit No 7723 of 1985 in the High Court at Kuala Lumpur against the insurers.

In the meantime the company was not making any payment of the instalments which fell due under the agreement. By an AR registered letter through their solicitors dated 22 October 1985 Ka Yin gave formal notice to the company that they were treating the persistent defaults in the payment of rentals due under the agreement as a repudiation by the company of its obligations under the agreement and that Ka Yin was accepting this repudiation as terminating the agreement, whilst reserving Ka Yin's rights to damages and other sums due. Without prejudice, Ka Yin's solicitors requested for delivery up of the bulldozer and for arrears under the agreement with interest thereon and other charges. This demand was not complied with and Ka Yin filed this action on 12 May 1986. The method by which Ka Yin computed the balance of the amount due to be paid to it is set out in para 9 of the statement of claim.

On 30 August 1986 the company filed a defence. This pleading is little more than a general denial which put the plaintiffs to strict proof of their entitlement to make the claim. So the plaintiffs immediately followed up with an O 14 application.

I would here emphasize that nowhere in this defence have the company alleged that they were under no liability to meet this claim either because the agreement had been frustrated or because there was some legal liability on the part of the plaintiffs to stay proceedings until the insurance claim had first been resolved.

Nevertheless even though the company's solicitors had many months notice of the O 14 application they bumped the plaintiffs' solicitors with an affidavit which was affirmed on 17 March 1987 in which these defences were raised. The hearing before the registrar was on 19 March 1987. The fact that the registrar dismissed the plaintiffs' application justifies an inference that he found that this contention on the part of the company raised a

triable issue. It is to be noted from this affidavit that the first defendant were not quarrelling with the computation of the amount of the claim. What they were insisting upon was that the insurance claim be first settled.

Clause 4(i) of the agreement was a complete answer to this submission. In material particulars, it reads:

> 4(i) Any insurance moneys received shall first be applied in paying to the owner the unpaid balance of the hire-purchase price and any other sums due from the hirer under the agreement with the hirer remaining liable to pay to the owner any deficit which may remain for the loss, destruction or damage in respect of which the insurance moneys were paid ... subject as aforesaid the loss, ... destruction of or damage to the goods *shall not discharge the hirer's liability to pay all sums due under this agreement.* (emphasis mine)

Counsel for the plaintiffs submitted two authorities both of which were completely on point. In *Hire Purchase Law and Practice by Goode*, 2nd Ed, p 337 is the passage reading:

> Where complete or substantial performance of the agreement becomes impossible by reason of some act or event occurring subsequent to the formation of the agreement, the supervening impossibility will in certain circumstances automatically determine the agreement and discharge the parties from further liability thereunder. Thus *in the absence of any contractual provision bearing on the point*, this result will occur where the goods are accidentally destroyed during the currency of the hire-purchase agreement without negligence on the part of the hirer or of any third party over whom the hirer can reasonably have been expected to exercise control. *But the terms of the agreement may be such as to indicate that destruction of the subject matter is not to be a frustrating event and that the hirers' obligation to redeliver is absolute.*

The second authority was *Tiong Goon Toon* v *Credit Leasing Corporation Sdn Bhd.*[1] There the appellant had taken a similar line. It was contended that the leasing agreements were 'frustrated' because the machinery, the subject matter of the leasing agreements, was destroyed by fire. But the agreements provided that 'in the event of any loss or damage to the equipment ... this lease agreement shall continue to have full force and effect without any amendment and in particular the rent shall continue to be payable in full'.

To my mind the effect of the agreement in this case is the same. Liability to pay the full rental continues despite damage or destruction.

Consequently there was no defence whatsoever to this claim.

I can readily appreciate the irritation of the first defendant of the manner in which they have been treated by their insurers. But there is nothing in the materials before me to indicate that Ka Yin are in any way contaminated by that conduct and consequently they must be held entitled to receive their moneys in accordance with the written agreement between them and the company.

Consequently the only decision in this case was to allow the plaintiffs' appeal with costs.

Appeal allowed.

Solicitors: *Shook Lin & Bok*; *Yusuf Lee Pathma & Marbeck.*

Reported by *Ng Sheau Jiuan*

Public Prosecutor v Jul bin Alih

HIGH COURT (TAWAU) – CRIMINAL TRIAL NO 4 OF 1987
MOHAMAD NOOR J
26 AUGUST 1988

Criminal Law – Dangerous drugs – Trafficking in – Possession of – Accused caught red-handed with bag of cannabis – Defence of frame-up by accused's friend – Whether defence believable – Whether statutory presumptions of possession and trafficking rebutted – Dangerous Drugs Act 1952, ss 37(d), (da)(vi) & 39B(1)(a)

The accused was charged with trafficking in 2,709.5 gm of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The case for the prosecution was that on 25 October 1986, acting on information received, a party of plainclothes police officers laid an ambush at Jalan Haji Karim and arrested the accused who was carrying a travelling bag slung across his shoulders. The bag was examined on the spot and found to contain cannabis. In his defence, the accused deposed that he came to Sabah illegally to look for a job and by chance met S, a friend who came from the same village in the Philippines. S then asked the accused to carry a bag containing his (S's) clothing and it was this bag which the accused carried when he was arrested. The accused asserted that S had framed him up and that S was in fact the actual owner of the drugs.

Held, convicting the accused:

(1) On the facts, it was clear that the accused was caught red-handed to have in his custody or under his control the bag which contained the drugs. As such, he was deemed to have possession of the drugs and to have known the nature of such drugs under s 37(d) of the Act until the contrary was proved. Further, having regard to the quantum, he was also presumed to be trafficking in the drugs under s 37(da)(vi), until the contrary was proved.

(2) There was clarity and consistency in the evidence of the members of the police party. There was also no break in the chain of evidence with regard to the custody of the drug from the date of seizure until its production in court.

(3) The court did not consider the accused's story to be reasonably true or consistent with innocence. The accused's assertion that S had framed him up is very hard to believe because if S had really wanted to frame him up, he could have used a lesser amount of drugs for the purpose, instead of the huge amount of 2,709.5 gm. Even if S was the owner of the said drugs, the accused would not be exonerated because the gravamen of the offence is against possession. Hence the accused had not rebutted the statutory presumptions on a balance of probabilities.